No. 17,762

IN THE

United States Court of Appeals

For the Ninth Circuit

PAUL JOHN CARBO, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANT GIBSON

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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I.

THE EVIDENCE IS INSUFFICIENT AS TO APPELLANT GIBSON

(Reply to Appellee's Point VI, B 3(c), Pages 222-228).

The prosecution must concede that to sustain the verdict against Mr. Gibson there must be evidence of acts or statements and declarations by Mr. Gibson himself sufficient to prove beyond a reasonable doubt that he was a party to the conspiracies charged. Innuendoes, evidence concerning others, and argument will not support the verdict, no matter how much they may have prejudiced the jury. Only evidence as to Mr. Gibson's conduct will suffice. Moreover, if any rational inference other than that of guilt can be

drawn from the evidence of Gibson's conduct, the verdict cannot stand.

The prosecution is well aware of these elementary principles. So, in an effort to meet appellant's contention that the evidence adduced at the trial did not support the verdict as to Mr. Gibson on any theory, the prosecution has summarized the evidence with respect to Mr. Gibson at pages 222-228 of appellee's brief.

Primarily, the prosecution relies upon the uncorroborated testimony of Leonard and Nesseth that Gibson told Leonard and Nesseth to pretend to "go along" with the alleged demand for a share of Jordan's purses. When Nesseth objected, according to him and Leonard, Gibson told them it would not cost them anything because he, Gibson, would pay any money demanded. Thus, the testimony of the prosecution's principal witnesses is wholly inconsistent with the charge that Gibson was a party to any conspiracy to extort money from Leonard and Nesseth. What those witnesses claimed was that Gibson undertook to keep them harmless from any demands which might be made on them!

The prosecution would have this Court ignore the testimony of Leonard, Nesseth, McCoy and Gibson that Mr. Gibson emphatically negated any possibility of violence. Even more important, the prosecution would have this Court ignore Mr. Gibson's uncontradicted testimony that he told Leonard and Nesseth that Jordan could have a title fight with Akins if they wanted it and that it was entirely up to them.

Seeking to corroborate Leonard's testimony that his promises to Palermo were made at Gibson's instigation, Leonard testified that he called Palermo on October 23, 1958, from a public telephone in the lobby of the Ambassador Hotel where Gibson was then staying. This call, according to Leonard, was made immediately after Gibson had met with Leonard, Nesseth and McCoy to discuss a championship fight for Jordan. The prosecution would like to ignore the fact that the only telephone call it proved from Leonard to Palermo was in fact made from a drugstore after Gibson had left Los Angeles. In addition, the testimony was uncontradicted that Gibson met with Leonard, Parnassus and others to discuss the formation of the Hollywood Boxing and Wrestling Club on the evening of October 23, 1958, and not even Leonard claimed that there was any reference to Palermo or Jordan in these conversations.

Contrary to the prosecution's statements, there never was any testimony that it was important to Gibson that an Akins-Jordan fight be held. On the contrary Mr. Gibson testified, without contradiction, that there were contenders other than Jordan available to fight Akins for the title and there were other championship fights which could have been scheduled for December 5, 1958, the date proposed for the Jordan-Akins fight, and the date on which it was held.

Thus the prosecution's principal evidence with respect to Mr. Gibson does not show that he was a party to a conspiracy and part of the prosecution's evidence is inconsistent with the facts as shown by the prosecu-

tion. The plain fact is that the prosecution failed to show that Gibson was a party to any conspiracy as the indictment charged. The testimony of Leonard and Nesseth does not warrant the inference that even they were so claiming. On the contrary their testimony is inconsistent with an inference that he was a party to a conspiracy to extort by violence when even the prosecution witnesses testified that Gibson asserted to them that violence "went out with high button shoes".

Apart from the Leonard-Nesseth testimony the prosecution relies upon four "examples of Gibson's flagrant conduct revealing the true nature of his associations with his co-conspirators and his consciousness of guilt with respect to this relationship . . ." (Appellee's Brief, Page 224).

The first of these is the payment by Nevill Advertising Agency to Viola Masters who was identified as the wife of John Paul Carbo. The evidence is uncontradicted that it was the decision of Mr. Norris to make these payments and they were made at his direction. Mr. Gibson was neither an officer of nor a stockholder of Nevill Advertising Agency. In this and in other corporate matters Mr. Gibson carried out, as he was legally obligated to do, the policies of the boards of directors to which he was responsible and his superior corporate officers. This cannot be said to be conduct of Mr. Gibson. In any event these payments terminated in 1957 long prior to the matter here involved.

The prosecution next points to a payment of $1,800.00 to Jackie Leonard by the Chicago Stadium Corpora-

tion at Mr. Gibson's direction. The prosecution labels as false the description of this payment on the books of that corporation as an advance on a Porterville promotion. As is so frequently the situation in this case the prosecution adduces no evidence to contradict the books and records and relies simply on an assertion of falsity. Such assertions are not evidence. Leonard admitted that he was endeavoring to arrange a promotion in Porterville. Mr. Malitz testified in detail about the matter. The payment of $1,800.00 was not made with funds of Mr. Gibson. Though it was made at his direction, the payment was in fact made by an Illinois corporation in which Mr. Gibson had no interest. Advances to promoters, fighters and managers were an integral part of this business. Thus there can be no inference of impropriety from this one. Ironically, Nesseth demanded, got and lied about another advance. It seems inconceivable that the Porterville advance warrants any inference. What Leonard did with the money cannot affect Gibson. As the evidence shows the IBC never sought to control or question what advances were used for. This was wholly a matter for the promoter or fighter to whom the advance was made.

The next item on which the prosecution relies is the payment by two checks totaling $9,000.00 to Frank Palermo on May 15, 1959, by Title Promotions, Inc. Of these the prosecution insists that the bookkeeping entries are "palpably false" and "Gibson's explanations are incredible." There is no evidence to contradict the defense showing that these payments were

made to Palermo in the ordinary course of promotion of boxing matches and had nothing to do with the matter alleged involved in this case. Palermo was in the boxing business and had been for many years. Payments by promoters, then, to him were not patently illegal. Gibson testified that one check for $4,000.00 was to reimburse Palermo for expenditures he had made for the benefit of Johnny Saxton who was ill. Saxton had been a world's champion who had fought under Palermo's management and had appeared in numerous IBC sponsored bouts.

Gibson also testified that the other $5,000.00 was paid for Palermo's services in keeping Sonny Liston willing to fight for Gibson. Is it incredible that businessmen would help an unfortunate fighter? Certainly Gibson's interest in Liston was publicly demonstrated not to be "incredible" when Liston won the heavyweight championship.

Finally, the prosecution points to a letter from Mr. Gibson to George Parnassus dated October 28, 1958, in which Mr. Gibson outlined his views of the way the Hollywood Boxing and Wrestling Club should be set up. It is uncontradicted that the Hollywood Boxing and Wrestling Club was not in fact set up in accordance with the outline of that letter. That letter really shows that Gibson had no control at all over Leonard or that club. What is more, careful review of the indictment, the evidence in this case and the prosecution's arguments all combine to show that the advances by the IBC and the efforts of Mr. Gibson in connection with the Hollywood Boxing and Wrestling

Club paralleled in time the matters involved in this case but had no relationship to them. Indeed, it is only the unfortunate coincidence in time and Mr. Gibson's efforts to finance Leonard's ill-fated attempt to promote boxing in the Legion Stadium that created on opportunity for the prosecution to seek to snare Mr. Gibson in their conspiracy dragnet.

Put all together, of the four "examples of Gibson's flagrant conduct" relied upon by the prosecution one was the conduct of some one other than Mr. Gibson which occurred long before the matter in question. Two are "flagrant conduct" only if the prosecution's unsworn statement is accepted rather than Mr. Gibson's testimony under oath corroborated by corporate records kept in ordinary course. The fourth is simply a suggestion of a lawful business arrangement which in fact was not carried out. If the word "flagrant" is to be used in connection with these matters it is best used to describe the lack of evidence upon which to support the conviction of Mr. Gibson.

Keenly aware of that lack of evidence the prosecution (Appellee's Brief, Pages 225-226) seeks to find "admissions" by Mr. Gibson in his testimony to support the conviction. They are no more successful in that than they were in producing proof.

We have already commented, and it will not be repeated here, on the impropriety of the questions with respect to the "underworld". But strain as they may the prosecution cannot make even that improper questioning amount to an admission of guilt of the conspiracy with which Mr. Gibson is charged here.

Both the questions and the answers are so vague and general as not to warrant any specific inference other than that IBC did not refuse to employ people because they might have had criminal records. There is no evidence that they used any persons because they had criminal records.

The Government points to the fact that Mr. Gibson testified that he had a telephone conversation with Palermo on April 29, 1959, the day before Palermo flew from Pennsylvania to Chicago, and then on to Los Angeles. The prosecution completely ignores the fact that the only evidence as to the subject matter of that conversation is the uncontradicted testimony of Mr. Gibson that it concerned Palermo's efforts to arrange a Hart-Jordan fight in Pittsburgh. The prosecution misstates an alleged admission: Palermo and Gibson were not "working towards the same objective: a Hart-Jordan fight". Gibson was endeavoring to promote a Hart-Jordan fight for Los Angeles for the benefit of Leonard's boxing club. Palermo was trying to arrange a Hart-Jordan fight in Pittsburgh under different promotional auspices. These facts are uncontradicted in the record. They are not "admissions" of anything.

That Mr. Gibson told Palermo to get out of Los Angeles in May, 1959, is no more of an "admission" than that Gibson told Leonard and Nesseth at about the same time that if they feared violence they should "run, not walk, to the nearest law enforcement officers". It can hardly be called an "admission" when a lawyer recommends recourse to law enforcement

officers or advises against urging demands which are denied.

Finally, the prosecution calls it an "admission" that Mr. Gibson was "neither concerned nor indignant" when Palermo told him that he had a share of Jordan's contract. This scraping of the barrel for inferences demonstrates the bankruptcy of the prosecution's case. Even more important this was not an admission of anything and the prosecution carefully refrains from describing what is admitted. Certainly lack of concern or lack of indignation does not satisfy the requirements of the federal law as to what is necessary to show criminal intent.

Even more preposterous are the prosecution's references as admissions to Carbo's congratulations to Gibson when he was elected president of IBC; Carbo's inquiry of Gibson about Leonard's testimony after the State Athletic Commission hearing, and a casual conversation between Carbo and Gibson in 1957. None of these things was illegal and none shows a guilty intent.

Finally, ignoring the sheaf of uncontradicted testimony about Gibson's concern about the insolvency of the Hollywood Boxing and Wrestling Club which owed the Company he represented $26,000.00 and owed $10,000 to an individual whom Gibson had persuaded to make a loan to Leonard, the prosecution points to Gibson's arrangement with Daly to go to Los Angeles to investigate the crisis at the Legion Stadium. In some respect this is the most farfetched of the prosecution's claims. The evidence shows with-

out contradiction, that what Mr. Gibson was doing was endeavoring to protect his lawful business interest and sought the aid of an individual who on the basis of long experience and contacts might have been helpful in saving the Hollywood Boxing and Wrestling Club. If this is an "admission" it is certainly only an admission that Gibson was protecting to the best of his ability business matters for which he was responsible.

Sometimes skillfully and sometimes relying upon distortions or misstatements of the evidence the prosecution seeks to explain the conviction of Mr. Gibson. But an explanation is not sufficient to support a conviction. A conviction must be supported by evidence which shows beyond a reasonable doubt that a defendant is guilty of the offense charged. In this case every reasonable inference of Mr. Gibson's conduct leads to a conclusion of his innocence, not his guilt. Thus, we respectfully submit, the evidence is insufficient to support his conviction.

II.

THE APPELLEE HAS NOT MET THE CHARGE THAT MR. GIBSON WAS DENIED A FAIR TRIAL.

A. Pretrial Conduct of the Prosecution.

To meet the charge that the pretrial conduct of the prosecution was improper, the prosecution relies upon allegations about "false hopes and forged documents" (see Appellee's Brief, Pages 298-299). None of the documents referred to is a part of this record. Neither Mr. Gibson nor his counsel has ever relied upon them.

If there is a question of good faith involved in this connection we respectfully suggest that the good faith of prosecution which goes outside the record must be seriously questioned. Appellee may now "welcome a judicial inquiry into the conduct of all counsel in this matter" but it resisted the effort of Mr. Gibson's counsel on February 20, 1960, prior to the trial to introduce evidence concerning this whole matter.

B. Conduct of the Prosecution During Closing Argument.

Appellee furnishes no record reference to any discussion by counsel for Mr. Gibson of Exhibits Z-36 and Z-37. Appellant's counsel contended on the trial, and contends now, that introduction of new matter by the prosecution on rebuttal was improper. Were it not so serious, it would be ludicrous for the prosecution to accuse counsel for the defense with improper conduct when it was a prosecutor who physically threatened defense counsel.

C. Prosecution's Use of False Testimony.

The prosecution told the jury on opening argument that Leonard had made inconsistent statements. This alone would be sufficient to warrant the charge that the prosecution had relied upon evidence which it knew was false and misleading. Significantly the appellee's brief refers to no proof to the contrary.

D. The Instructions.

Though the appellee argues at length to justify the instructions it nowhere justifies the instruction as to agency given by Judge Tolin after the jury had re-

turned (see Appellant Gibson's Opening Brief, Page 55).

E. Disposition by the Successor Judge.

Appellee seeks to justify disposition of this matter by a successor judge. Nowhere does appellee attempt to justify disposition of a case wholly dependent upon the credibility of witnesses by a judge who did not hear those witnesses. This is particularly important in this case where the prosecution relied principally upon two witnesses, Leonard and Nesseth, and where four of the five defendants, including Mr. Gibson, testified at length. There is a sharp conflict in the testimony particularly as to certain points between the testimony of Mr. Gibson and Leonard and Nesseth and we repeat, as we asserted in the opening brief, that the prosecution made no effort to rebut Mr. Gibson's testimony by either Mr. Leonard or Mr. Nesseth and the record shows this to be the case.

Under all these circumstances we respectfully submit that Mr. Gibson, for this reason, among others, was denied a fair trial.

III.

CONCLUSION

Within the limitations fixed by the Rules of this Court, and despite the enormity of the record here, we have sought to point out to the Court matters which we respectfully submit require setting aside the conviction of Mr. Gibson. Accordingly, we pray that this Court will do so.

Dated, October 5, 1962.

Respectfully submitted,
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Attorneys for Appellant Gibson.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney for Appellant Gibson.